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No. 96- _____

In The
Supreme Court of the United States

October Term 1996

MARY E. LEONARD,
Petitioner,

v.

TOWN OF BRIMFIELD and CYNTHIA K. POWERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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October 1996

QUESTION PRESENTED

Was there a compensable taking where a town enforced a one-thousand year flood plain zone, for the first time, after the petitioner purchased land, destroying her investment-backed expectations for two parcels in her four-parcel subdivision?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

MARY LEONARD respectfully petitions this Court for a writ of certiorari to review the order and opinion of the Massachusetts Supreme Judicial Court affirming the judgment of a Massachusetts Superior Court that the Town of Brimfield did not effectuate a compensable taking of two parcels of land.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 423 Mass. 152, 666 N.E.2d 1300 (1996) and is Appendix A to this petition. The rulings and decision of the Massachusetts Superior is Appendix B. The opinion of the State of Michigan Court of Appeals is Appendix C, and the Findings, Rulings and order for Judgment of the Brimfield Zoning Board of Appeals is Appendix D.

JURISDICTION

The opinion and order of the Massachusetts Supreme Judicial Court was rendered on July 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Unites States Constitution, Fifth Amendment:

". . . nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment:

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

On July 9, 1987, Mary Leonard of Brimfield, Massachusetts sued the Town of Brimfield (Brimfield). In Count III, Leonard asserted that Brimfield's decision to enforce a one thousand

(1,000) year flood plain zone,[1] was a regulatory taking subject to the Just Compensation Clause. A Massachusetts Superior Court entered judgment for Brimfield on Count III. (A.19-30). The Massachusetts Supreme Judicial Court affirmed the judgment (A.1-18).

In August 1986, Leonard bought a sixteen acre lot between the Quaboag River and Dunhamtown Road, Brimfield, Massachusetts. She immediately hired Engineer Donald Smith to draw a plot plan subdividing the land into parcels 12A through 12D. (A.70-71). The parcel described on Leonard's original building permit application was 3.9 acres, which

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[1] See footnote 4, for calculation of estimated flooding frequency.

corresponded with lot 12B of her subdivision. (A.21-23).

Leonard testified that she prepared her subdivision plan in early 1987. The board approved it in 1988 and Leonard recorded it on January 13, 1989.[2] (A.24-25). After her land purchase, Leonard hired contractor Robert Simcus who applied for a building permit to build specifically on parcel 12B of Leonard's subdivision as drawn by Engineer Donald Smith. (A.70-72). Building inspector Jack

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[2] The Superior court found that Leonard's property was a single 16-acre lot and that Leonard had taken no action to subdivide her property until one year after she filed the civil action on appeal before this Court. It found that the ZBA's decision to restrict construction to an elevation greater than three hundred seventy (370) feet allowed Leonard to build on six of the sixteen acres originally purchased.

Keogh issued a permit, but revoked it when he determined that Leonard's land was in a flood plain zone and not formerly subdivided and planning board approved . . . even though Leonard's subdivision was designated "approval not required." (A7-8).[3]

Leonard learned, for the first time, that her land was in a flood plain when Mr. Keogh revoked her building permit. Consequently she sought a special permit before the Brimfield Zoning Board of Appeals (ZBA). Nine months later, in June

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[3] Mr. Keogh explained that he revoked the permit when he notice that the application indicated that the permit applied to a plot of 3.9 acres and the land was in a flood zone. He made it clear that the absence of the stamped and approved subdivision was immaterial to his decision because the planning board would have approved the subdivision merely by stamping it approved. The flood plane zone was the issue.

2, 1987, the ZBA issued a special permit containing the restriction that Leonard build her house at an elevation of at least three hundred seventy (370) feet, which is approximate elevation of a one thousand year (1,000) year flood plain zone (A.70-73).[4]

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[4] Michael Koprowski, who was chairman of the ZBA when it reviewed Leonard's special permit application in 1987, testified incorrectly that Leonard's entire property was in a one hundred (100) year flood plain zone. Leonard's trial counsel suggested that the flood plain zone existing above Leonard's property was a five hundred (500) year zone. The trial court "seemed to recall that [Welch, J.] found that part of Leonard's land was in the one hundred (100) year plain and part of it was in a five hundred (500) year plain.

Koprowski also testified incorrectly that the elevation of the Quaboag River was three hundred sixty (360) feet and that the ZBA wanted a ten (10) foot elevation between Leonard's house and the river. Three hundred sixty (360) feet is the elevation of the one hundred (100) year flood plain zone and not the elevation of the river. Some of Leonard's land is below the one (100) hundred year flood plain, some is in

The Brimfield bylaws require that anyone in a flood plain must get a special permit to build. The Chairman of the Zoning Board of Appeals testified by implication that persons, who built homes near the Quaboag River on Dunhamtown Road, in the flood plain, before Leonard, built without special permits because

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the one hundred (100) hundred year plain (above 360 feet) some of her land is in the five hundred (500) year flood plain (above 365 feet) and some is in the one thousand to twelve hundred year flood plain (above 370 feet, which the elevation required in this case for construction) (A.70-73 [findings of Welch, J.]). Each vertical foot of elevation corresponds approximately to an additional one hundred years in expected frequency of flooding. See for example, three-hundred sixty (360) foot elevation is the elevation for the one hundred year flood plain zone and three-hundred sixty-five (365) is the elevation for the five hundred (500) year flood plain zone. The estimated flood frequency at the three hundred seventy (370) foot elevation, therefore, is one thousand years (1,000) (A.70-73).

there was a different building inspector.

The record shows that Brimfield allowed construction of two houses in the flood plain without enforcing the bylaws requiring a special permit to build at any elevation. The trial court noted (at trial) that Leonard's case represented the first incidence of the town enforcing the flood plain zone by proscribing construction below the elevation of three hundred seventy (370) feet.

Economic Impact On Leonard

Parcels 12C and 12D of Leonard's subdivision have elevations substantially below three hundred seventy (370) feet. (A.20-24). A uncontradicted expert testified that parcels 12C and 12D could have been further subdivided into four

lots, in compliance with the town's building code, having a fair market of twenty to twenty five thousand dollars ($20,000.00 to $25,000.00) each.

REASONS FOR GRANTING THE WRIT

I. The Opinion Of The Massachusetts Supreme Judicial Court Conflicts With The Opinion Of The State Of Michigan Court Of Appeals.

The Massachusetts Supreme Judicial Court reasoned that Leonard did not hold a "reasonable" investment-backed expectation to subdivide her land because the land was in a flood plain when she purchased it. Because Leonard "purchased the property subject to the restrictions on building in a flood plain, the reasoning continued, she may not complain about the loss of a right she never

acquired. (A.11), citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992), and ignoring Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (The landowners' rights were not altered because they acquired the land well after the commission had begun to implement its policy. So long as the commission could not have deprived the prior owners of the easement without compensation, the prior owners must be understood to have transferred their full property rights in conveying the lot).[5]

On June 4, the State of Michigan

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[5] The Supreme Judicial Court also determined that the economic impact on Leonard was not severe since she was able to build one house and finally, it determined that the character of the governmental action did not show physical invasion. (A.12-14).

State Court of Appeals followed Nollan v. California Coastal Comm'n, reasoning that a sequence of regulation and then ownership would not preclude compensation for a taking where it would otherwise be due. See K & K Construction Inc. v. Department of Natural Resources. (A.31-69, [specifically A.44-46]). This reasoning directly conflicts with the reasoning of the Massachusetts Court that land restriction which existed at the time of purchase bars an action for taking because the government cannot take what did belong to the petitioner.

II. The Opinion of the Massachusetts Supreme Judicial Court Was Erroneous Because There Was A Compensable Taking Where Brimfield Enforced A One-Thousand Year Flood Plain Zone, For The First Time, After Leonard Purchased Land, Which Destroyed Her Investment-Backed Expectations For Two Of Four Parcels.

A. Unless Governmental Action Amounts to a "Per Se [Categorical] Taking" Courts Must Engage in Fact-Specific Analysis, Using a Three-Pronged Test to Determine Whether There Is Violation of the Takings Clause.

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use without just compensation." U.S. Const., Amend. V. The Takings Clause is applicable to the states through the Fourteenth Amendment. See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith,

449 U.S. 155, 160 (1980).

This Court has refused to develop any set formula for determining which property-right infringements amount to compensable takings, relying "instead on ad hoc, factual inquiries into the circumstances of each particular case." Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986). Three factors paramount in this inquiry are: (1) the regulation's "economic impact" on the property owner; (2) the extent to which the regulation interferes with "distinct investment-backed expectations:" and (3) the "character" of the interference, that is, whether the governmental action is more akin to a physical invasion or to a necessary readjustment of economic

benefits and burdens. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). accord Connolly, 475 U.S. at 225; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

This Court identified two categories of governmental action that are per se compensable violations of the takings clause and require no further case-specific analysis. See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 120 L.Ed.2d 798, 812 (1992). The first category is a physical invasion of property no matter what the justification. Id. The second category is regulatory action that denies "all economically beneficial or productive use of land." Id. 112 S.Ct. 2886, 120 L.Ed.2d

at 813, citing, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (hallmark of per se compensable taking is denial of "economically viable use of [an owner's] land"); Nollan v. California Costal Comm'n, 483 U.S. 825, 834 (1987) (same); McAndrews v. Fleet Bank Of Massachusetts, N.A., 989 F.2d 13, 18 n.7 (1993). Other less sweeping regulatory action, however, even action that does not unquestionably deny "all economically beneficial or productive use of land," may still amount to a compensable taking under federal law. The determination depends upon the results of a case-specific three-pronged test. See the last paragraph in this Section and Section I.C., below.

According to the Lucas Court, the

standard, "all economically beneficial or productive use of land," is difficult to apply and causes inconsistent results. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d. at 813 n.7. Justice Scalia pointed out that this standard lacks precision because it does not make clear the "property interest" against which the loss of value is to be measured. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 813 n.7.[6]

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[6] Because of this lack of precision, even this Court had produced disparate holdings. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 813 n.7., comparing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking). See also Rose, Mahon Reconstructed: Why The Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566-569 (1984). It is important, for this reason, to clarify "takings" jurisprudence for the States.

Justice Scalia suggests that the resolution to this imprecision, even for per se compensable takings, requires consideration of the property owner's reasonable expectations. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 813. Justice Scalia made it clear that property owners, such as Leonard, who may not be able to claim the benefit of the categorical formulation ("all economically beneficial or productive use of land"), may still rely upon a well-established rule that "the economic impact of regulatory action on the claimant and . . . the extent to which the regulation has interfered with [her] distinct investment-backed expectations" are keenly relevant to takings analysis.

Id. 112 S.Ct. 2886, 120 L.Ed.2d at 815 n.8, citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

B. Brimfield's Regulatory Action Caused Leonard to Lose The Market Value of Two Complete Parcels in Her Subdivision.

Leonard suffered a severe economic penalty when the Zoning Board of Appeals enforced the one-thousand year (1,000) year flood. Penn Cent. Transp, 438 U.S. at 124; McAndrews, 989 F.2d at 18. Leonard showed that parcels 12C and 12D are below three hundred seventy (370) feet in elevation (R.73,75-76,175-176). The special permit issued to Leonard barred construction below this elevation (R.73). Consequently, as a result of Brimfield's ZBA special permit

restriction, parcels 12C and 12D lost all resale value as building lots.

Uncontradicted testimony from Leonard and from a real estate expert showed that the market value of these four parcels (12C and 12D each further subdivided) was at least in the range $80,000.00 and $120,000.00 (R.122-25,83). The appraiser suggested that the parcels' frontage on the Quaboag River very likely further enhanced their resale value (R.135). When Brimfield enforced its flood plain zone substantially above the five hundred year flood plain, for the first time, (R.40-42,73), Leonard lost the entire resale value of parcels 12C and 12D. For these reasons, the economic impact on Leonard was severe and

satisfied the first prong in a "takings" analysis. Penn Cent. Transp, 438 U.S. at 124; McAndrews, 989 F.2d at 18.

C. Brimfield's Regulatory Action Destroyed Leonard's Distinct Investment Backed Expectations.

Brimfield frustrated Leonard's "distinct investment-backed expectations." Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 815 n.8; Penn Cent. Transp, 438 U.S. at 124; McAndrews, 989 F.2d at 18. Leonard testified that, when she bought her land, she intended to subdivide it and sell some lots. To this end, she hired engineer Donald Smith to draw a plot plan subdividing the land into four parcels. (A.70-72). Even her original building permit reflected Leonard's subdivided four parcels (A.70-

72), which the Brimfield Planning Board eventually approved, and which she recorded on January 13, 1989. (A.24-25).

Because the special permit elevation limitation completely destroyed resale value of two of the subdivided lots, Leonard's distinct investment-backed expectations similarly frustrated. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 815 n.8 (investment-backed expectations keenly relevant to takings analysis); Penn Cent. Transp, 438 U.S. at 124 (same); McAndrews, 989 F.2d at 18 (same).

Leonard recognizes that a takings analysis ordinarily does not consider the effect of a governmental restriction on particular segments of the claimant's property, but on the parcel as a whole.

Fragopoulos v. Rent Control Bd., 408 Mass. 302, 308 (1990); Penn Cent. Transp., 438 U.S. at 130-131. In this case, however, Leonard's particular investment-backed expectation was profit from subdividing and selling certain parcels, which should permit treating each of the four parcels separately. Otherwise the "distinct investment-backed expectations" prong of the federal analysis becomes meaningless.

D. Brimfield Imposed its Special Permit Requirement Inequitably Against And Regulated Against a Highly Unlikely Occurrence.

To further inform a "takings" analysis, courts should consider whether other landowners, similarly situated, were permitted to continue a use denied

Leonard. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 822. Brimfield bylaws require that persons building in a flood plain obtain a special permit.

ZBA Chairman Koprowski testified that other persons who built on Dunhamtown Road, before Leonard, were allowed to build without obtaining the required special permit because there was a different building inspector. The restrictions imposed on Leonard represented not only the first time that the ZBA imposed the three hundred seventy (370) foot elevation limitation, but also was the first time that Brimfield enforced its flood plain, at all regardless of the proposed building elevation.

That Brimfield enforced a one thousand (1,000) year flood plain zone, for the first time, and required a special permit to build in this flood plain (at any elevation) for the first time, is relevant to this Court's review of whether the action was a compensable "taking" because other land owners who were similarly situated (to the extent that they built in a flood plain) were permitted a use denied Leonard. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 822.

Leonard recognizes that the validity of the ZBA's action is not at issue. However, whether the ZBA's action was discriminatory, unfair, or ostensibly "regulated" a highly unlikely event is relevant to whether this Court should

deem the action a "taking" under federal law. See Lopes v. City of Peabody, 417 Mass. 299, 301-03 (1994) (distinguishing between an action which challenges the validity of regulatory action, and an action which asserts that valid regulatory action is a "taking"). See Also Lopes, 417 Mass. 305 n.9 (emphasizing that this Court did not say that a regulatory taking occurred only when property was rendered valueless), referring to Lucas, 112 S.Ct. 2886.

According to the Supreme Judicial Court in Lopes, regulatory action based on an event likely to occur only once each hundred (100) years may not warrant the action. Lopes, 417 Mass. 306 n.12. Here, the event anticipated by

regulation, presumably will occur approximately once every one thousand (1,000) years and, for this reason, further supports the conclusion that Brimfield's action should be deemed a "taking" because it was discriminatory and was based on the occurrence of a highly unlikely event. Id.; Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 822.

Considered in perspective, Brimfield may wait five times the age of the United States before the Quaboag River will rise to a level of three hundred seventy (370) feet. The river has presumably has risen to this level only twice since the time of Christ. For these reasons, Brimfield's regulatory action should be deemed a taking.

III. The Questions Presented Are Important.

Because the government has the right to interfere with or to take private property, its continued obligation to pay for such property is important to citizen owners' due process rights. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California, 482 U.S. 304, 314 (1987). The right to just compensation is grounded in the Constitution itself. Jacobs v. United States, 290 U.S. 13, 16 (1933).

There is a tension between a citizen's right not to be deprived of private property without due process and the government's land-use planning function. Although a taking is plain when

there is exercise of eminent domain, whether a land regulation becomes a taking is less clear. Consequently, Massachusetts has misapplied Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), ignored Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and permitted Brimfield to take Leonard's property without paying for it. In so doing, Massachusetts engaged in a "taking", and the Supreme Judicial Court engaged in a "takings clause" analysis in conflict with Michigan's analysis. Because governments will and must continue to regulate land use, this issue will continue to arise. Therefore, the question presented is ripe. This Court should resolve the conflict between the

states and give further guidance on how to analyze correctly an alleged regulatory taking.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted

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APPENDIX A

MARY E. LEONARD vs. TOWN OF BRIMFIELD & another.[1]

SJC-07008

423 Mass. 152, 666 N.E.2d 1300

March 5, 1996, Argued

July 11, 1996, Decided

PRIOR HISTORY: Hampden. Civil action commenced in the Superior Court Department on July 9, 1987. Motions to amend and to dismiss were heard by William H. Welch, J., and the case was heard by John F. Murphy, Jr., J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment Affirmed

COUNSEL: Greg T. Schubert for the Plaintiff.

William Hewig, III, for the Defendants.

JUDGES: Present: Liacos, C.J., Wilkins,

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[1] Cynthia K. Powers, individually and as chairperson of the Brimfield conservation commission.

Abrams, Lynch, & Greaney, JJ.

OPINION: LYNCH, J.

The plaintiff owns sixteen acres of land in the town of Brimfield (town). This action, commenced in 1987, is one of three filed by the plaintiff involving this property contesting actions by the town which effectively limit the plaintiff's use of this land. The plaintiff alleges that the town is artificially channeling surface water onto the property and is improperly enforcing a flood plain zone which restricts development of the property.

As required by the town zoning-by-law, the plaintiff applied to the zoning board of appeals (board) for a special permit to building on her land as it was

located in an area designated as a flood plain zone. The board issued a special permit which limited construction on land at or above the 370-foot elevation mark. This effectively limits construction to approximately six of the plaintiff's sixteen acres.

In the first action the plaintiff appealed from the board's special permit restriction as arbitrary or capricious. A Superior Court judge upheld the board's decision, and the Appeals Court affirmed. 27 Mass. App. Ct. 1408 (1989). We denied further appellate review. 405 Mass. 1204 (1989).

The second action involved water channeling claims and was settled by a released dated October 28, 1988. In that

release, the plaintiff discharged the town and the town's insurer from all water channeling claims to the date including the channeling claims in the present case.

In this action the plaintiff alleges that: (1) the town is liable for damages for artificially channeling surface water onto her property (counts one and two); (2) the town's enforcement of its flood plain restriction constituted a compensable taking under the United States Constitution (count three); and (3) the plaintiff's civil rights had been violated by the chairperson of the Brimfield conservation commission and she was entitled to damages under G.L. c. 12,

§ 11I (1994 ed.) (count four).[2]

The defendants moved to dismiss counts one, two, and three of the complaint arguing that the water channeling release of October 28, 1988, barred those claims. The plaintiff countered by filing a motion to amend with alternative amended complaints. In the first amended complaint, she sought to limit her water channeling claim to damages incurred after the date of the release. In the second amended complaint, she alleged that the enforcement by the town of the flood plain restriction constituted a compensable taking under State law.

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[2] There was no appeal from the denial of that claim.

The motion judge denied the motion to amend, and allowed the defendants' motion to dismiss counts one and two, treating it as a motion for summary judgment.

A bench trial was held on counts three and four of the present action. The judge found for the defendants on both counts and dismissed the plaintiff's claims for damages. We transferred the case here on our own motion. The plaintiff argues that the judge applied the wrong standard to decide whether the enforcement of the flood plain restriction was a compensable "taking" under Federal law. She also argues that the motion judge erred in denying her motion to amend the complaint.

The validity of the board's enforcement of this zoning by-law has been adjudicated. Therefore, we do not consider issues settled in previous litigation as to the actual likelihood of flooding at the various elevations, nor the validity of the special permit as applied to the plaintiff's land. The only issues before use are whether the plaintiff should be compensated by the town for the decrease in value of her land caused by the restriction and whether she should have been permitted to amend her complaint.

The regulatory "taking" issue. The plaintiff argues that the town's actions constitute a taking under the Fifth Amendment to the United States

Constitution.

When a regulatory taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, Federal law has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred; "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" Connelly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225, 89 L. Ed. 2D 166, 106 S. Ct. 1018 (1986), quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124,

57 L.Ed. 2D 631, 98 S. Ct. 2646 (1978).

(1) Investment-backed expectations. The plaintiff contends that, at the time of purchase, she intended to subdivide the sixteen acres and because of the special permit restriction, she lost the market value of two parcels in her subdivision.

A property owner's investment-backed expectations must be reasonable and predicated on existing conditions. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 81 L. Ed. 2D 815, 104 S. Ct. 2862 (1984. It must be more than a "unilateral expectation or an abstract need." Id., quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 66 L. Ed. 2D 358, 101 S. Ct.

446 (1980). The plaintiff's argument fails because she could not have had a reasonable, investment-backed expectation that she would have been permitted to subdivide the flood plain property.

Her property was within a designated flood plain zone and a special permit was required for construction on the lots in question.[3] A the time she purchased the property she had constructive notice of a zoning map, which was available for viewing at the building inspector's office. Her position that the flood plain

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[3] We have held that a purchaser of land subject to a restriction at the time of purchase has a right to challenge the continued application of the restriction. Lopes v. Peabody, 417 Mass. 299 303, 629 N.E.2d 1312 (1994). Here, the plaintiff availed herself of her right to contest the special permit restriction, but did not prevail.

map should have been recorded with the registry of deeds is without merit. The statute which sets forth the requirements of municipal zoning regulations contains no such requirement, see e.g., G.L. c. 40A (1994 ed), and she offers no citation to support this argument.

Because she purchased the property subject to the restriction on building in a flood plain, she may not complain about the loss of a right she never acquired. See Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1027, 120 L. Ed. 2D 798, 112 S. Ct. 2886 (1992). "The government is not required to compensate an individual for denying him the right to use that which he has never owned." Fragopoulos v. Rent Control Bd. Of

Cambridge, 383 Mass. 152, 160, 418 N.E.2d 335 (1981).

Furthermore, the trial judge found that the parcel at issue is a single sixteen-acre parcel, not individual lots within this parcel as the plaintiff contends, and that the plaintiff had taken no action to subdivide the property. This finding is completely supported by the record. Mass. R. Civ. P. 52 (a), 365 Mass. 816 (1974). Kendall v. Selvaggio, 413 Mass. 619, 620, 602 N.E.2d 206 (1992). The plaintiff did not have a reasonable investment-backed expectation that she could subdivide the property.

(2) Economic Impact. The plaintiff's theory of economic impact on the property was also made without considering the

existing zoning restrictions.

Even if we ignore the fact that the zoning restriction was in place prior to the plaintiff's purchase of the property, the evidence was insufficient to show that the economic impact was severe. The plaintiff's economic loss argument is based on her inability to build houses on approximately ten acres of her sixteen-acre parcel. This has not frustrated her purpose to build her own home on the parcel which she has done. There is no dispute that the complete sixteen acres is suitable for agricultural, horticultural, and recreational purposes. The land was used for agricultural purposes prior to her purchase and can continue to be used as such. As stated by

the United States Supreme Court: "Zoning laws are, of course the classic example [of land use regulations] which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property" (citations omitted.) Penn Cent. Transp. Co. v. New York City, supra at 125.

(3) The character of the governmental action. The final factor that may be considered is the character of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." Id. at 124. Here, there was no physical invasion of the plaintiff's property alleged apart from the water

channeling claims. Those claims are barred by the release given in connection with her prior litigation.[4] Her takings claim is based on the zoning restriction and special permit process which is not a physical invasion by the government.

Thus, in view of the facts before us, the effect of the zoning and special permit restriction on the plaintiff's land does not constitute a compensable taking under federal law.

(4) Disallowance of motions to amend. The plaintiff also argues that she should have been permitted to amend her complaint to include claims based on

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[4] The release states in pertinent part: "This release excludes cases # 87-1238 [the instant case] except as to water [channeling] claims."

water channeling that occurred after October 28, 1988, and, in the alternative, a claim for damages under State law for the devaluation of her property caused by the zoning restriction. Under the rules of civil procedure, leave to amend a complaint shall be "freely given when justice so requires." Mass. R. Civ. P. 15(a), 365 Mass. 761 (1974). The decision to grant such a motion lies within the discretion of the judge, but leave should be granted unless there are good reasons for denying the motion. Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264, 565 N.E.2d 1180 (1991).

The judge denied the motion to amend for the following reasons: (1) the motion

to amend was filed more than five years after the plaintiff filed the original complaint; (2) the case had been called as an "inventory case," thus the judge believed that the trial was imminent; (3) the claims were interrelated with the claims that had been adjudicated or settled in prior proceedings.

In these circumstances it was not an abuse of discretion for the judge to deny the motions to amend. We have considered undue delay, imminence of trial, as well as futility of the claim to be valid reasons for the denial of a motion to amend. See All Seasons Servs., Inc. v. Commissioner of Health & Hosps. Of Boston 416 Mass. 269, 272, 620 N.E.2d 778 (1993); Mathis v. Massachusetts Elec.

Co., supra, at 265-265; Castelluci v. United States Fidelity & Guar. Co., 372 Mass. 288, 292, 361 N.E.2d 1264 (1977).

Although the case was not actually tried for seventeen months after the denial of the motion to amend, the case had been pending for over five years and the judge believed the trial was imminent. Those facts alone provided a sufficient basis for the judge's action. The plaintiff's motion to amend was properly denied.

Judgment Affirmed.

APPENDIX B

MARY E. LEONARD vs. TOWN OF BRIMFIELD & another.[5]

Superior Court Civil Action No. 87-1238H

FINDINGS, RULINGS AND ORDER

The plaintiff filed this action in the Hampden County Superior Court, C.A. No. 87-1238 on July 17, 1987. On July 31, 1992, Superior Court (Welch, J.) dismissed Counts I. And II of the plaintiff's Complaint (relating to allegations of water damage) as based on claims which were the subject of an earlier release. That left for the trial Count III (claim for compensable taking

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[5] Cynthia K. Powers, individually and as chairperson of the Brimfield conservation commission.

under the fifth amendment of the United States Constitution, and through the due process clause of the fourteenth amendment, alleging an unconstitutional taking of the 10 acres of property below the 370-foot-elevation level, (upon which the plaintiff cannot build a house), and Court IV (violations of M.G.L. c. 12, §11I, alleging a "joint venture" by the defendants Cynthia Powers and members of the Conservation Commission to have a building permit issued by Building Inspector Jack Keough revoked through coercion, intimidation and threats).

Based upon all of the credible evidence, the exhibits and the reasonable inferences to be drawn therefrom, I find and rule as follows:

1. The plaintiff, Mary E. Leonard, was at the time of the filing of this suit the owner of 16 acres of land lying between the Quaboag River and Dunhamtown Road in Brimfield, Massachusetts. The area was and is zoned Flood Plain under Brimfield's zoning bylaws.

On March 30, 1987, Jack Keough, Brimfield's Building Inspector, issued building permit no. 8726 upon request of the plaintiff, for construction of a single-family house upon so-called "lot 12B" of the Leonard property. On or about April 1, 1987, Mr. Keough had a conversation with Cynthia Powers, of Brimfield's Conservation Commission. In that conversation, Ms. Powers told Mr. Keough that lot 12 (which as then the

designation for the entire 16 acres) was in a wetland and required a special permit from the Board of Appeals. Following that conversation, Mr. Keough checked the Town's zoning maps and determined that Lot 12 was within the Town's flood plain zone, and therefore, under the Town's zoning bylaws, construction required a special permit. As a result of his own research, Mr. Keough then proceeded to revoke the March 30th building permit on April 2, 1987.

The plaintiff Mary Leonard then filed a request for a special permit with the Board of Appeals on or about April 13, 1987. By a decision dated June 2, 1987, the Board of Appeals granted the request for a special permit but limited

construction to land at or above the 370-foot-elevation mark. Approximately 6 our of the total 16 acres are situated above the 370-foot-elevation mark. The plaintiff then appealed the Board of Appeals' June 2 1987 decision as arbitrary and capricious to the Superior Court. Her case was captioned "Mary E. Leonard v. Zoning Board of Appeals of Brimfield" and assigned Hampden Superior C.A. No. 87-1077. After trial the Superior Court (Welch, J.) upheld the June 2, 1987 decision in his Findings, Rulings and Order for Judgment dated October 19, 1987. The plaintiff appealed to the Massachusetts Appeals court, which affirmed the judgment of the Superior Court on April 27, 1989, 27 Mass. App.

Ct. 1405 (1989). The Supreme Judicial Court denied further appellate review on August 17, 1989, 405 Mass. 1204 (1989). Following the exhaustion of her appeals, the plaintiff then proceeded to construction her house on the 6 acres of her parcel located above the 370-foot-elevation mark.

2. At the time of the issuance of the original building permit, (March 20, 1987), and also at the time of filing of this lawsuit, (July 17, 1987) the subject property was a single 16-acre lot and the plaintiff had taken no action to subdivide her property. Approximately one year after she filed this action, an Approval Not Required ("ANR") subdivision plan was filed with the Brimfield

Planning Board. This plan was not recorded until January 13, 1989 (Book 263, Page 33 of the Hampden County Registry of Deed).[6]

Under the terms of the special permit, 6 acres of the 16 acre parcel was available for building construction. A portion of this 6 acres was used by plaintiff to construct her own home.

A previous owner of the property had registered the property under G.L. c. 61A as agricultural land. The plaintiff's predecessor in title had purchased the property subject to the agricultural lien

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[6] This plan indicates it was prepared for "Gregory Schubert" in March of 1987. It was submitted to the Planning Board July 20, 1988, and was not recorded until January 13, 1989. Plaintiff's name does not appear on the plan. (Exhibit #4).

with the intention of operating a nursery on the property (pg. 12, transcript deposition Brian Haley). When plaintiff purchased the property the lien was removed as was the agricultural designation. [7] There is no dispute that the complete 16 acres is suitable for agricultural, horticultural and or recreational purposes.

RULINGS

3. Plaintiff seeks damages, alleging a constructive taking of two building lots shown as lots 12C and 12D on the Schubert plan of land (Exhibit #4). The plaintiff refers to Lucas v. South

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[7] At attempt was made by members of the Conservation Commission to have the town exercise its right of first refusal and purchase the property. The town's financial problems prevented the exercise of this right.

Carolina Coastal Council, 112 S. Ct. 2886 (1992). The plaintiff's reliance on Lucas is misplaced. The Lucas case dealt with a situation where after the plaintiff purchases the beach front property the state declared the property to be within the "critical area", thereby depriving the owner of all beneficial economic use of his property. That is not the case at bar. In the case at bar the Flood Plain Zoning Maps and requirements for a special permit were in effect at the time plaintiff purchased the land.

Nor did the regulatory action deprive plaintiff of all beneficial use of her property. Turnpike Realty Company, Inc. v. Dedham, 362 Mass. 721 (1972);

also Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979). Unconstitutional takings are those actions which "strip private property of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it." Lovequist id., at 20. In the case at bar the plaintiff cannot fairly claim that she has been deprived of all beneficial use of her property.

4. The evidence at trial is undisputed that the actions of the Brimfield's Zoning Board of Appeals, and Brimfield's building inspector Jack Keough in enforcing Brimfield's bylaws were at all times in compliance with the Town's bylaws, and General Laws Chapter

40A.

There is no credible evidence the Cynthia Powers either individually or as chairperson of the Conservation Commission pursued a coarse of opposition to plaintiff or of plaintiff's right secured by the constitution or laws of the Commonwealth. Nor is there any credible evidence that she sought a selective enforcement of the flood plain zone. The actions attributable to Cynthia Powers fall far short of proof of acts intended to ". . . Frighten, harass, or humiliate by actual use of threats, intimidation or coercion" required to prevail under G.L. c. 12, § 11I. Silva v. Building Inspector of West bridgewater, et al., 35 mass. App. Ct. 451 (1993).

ORDER

Count III - Plaintiff's claim for damages against the Town of Brimfield is dismissed. Judgment for defendant Town of Brimfield.

Count IV - Plaintiff's claim for Violation of M.G.L. c. 12, §11I is dismissed. Judgment for the defendant Cynthia K. Powers individually and as Chairperson of the Brimfield Conservation Commission.

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John F. Murphy, Jr.,
Justice of the Superior Court

Entered: April 13, 1994

APPENDIX C

K & K CONSTRUCTION, INC. J.F.K COMPANY, AND RESORTS AND COMPANY, vs. DEPARTMENT OF NATURAL RESOURCES AND MICHIGAN ASSOCIATION OF HOME BUILDERS.

No. 168393

June 4, 1996, Published

JUDGES: Jansen, P.J., and Taylor and J.P. Noecker. JJ.

OPINION by: JANSEN, P.J.

This is a regulatory taking case. Defendant Department of Natural Resources Appeals as of right from a September 8, 1993, judgment of the Court of Claims in plaintiff's favor. The Court of Claims determined that a taking had occurred as a result of defendant's decision to deny plaintiff's application for a permit to build a restaurant on a parcel of land on the basis that the land was protected

wetlands. The Court of Claims awarded $3,245,256 for the property taken, plus interest of $1,574,522.60, and $459,400 based on a temporary taking of part of the land. We affirm.

I.

Plaintiffs own approximately 82 acres of property in Waterford Township in Oakland County. The property was acquired in 1976 by Joseph and Elain Kosik. J.F.K. Company is a Michigan limited partnership consisting of the five children of the Kosiks. J.F.K. Company is a part owner of the property through a quit claim deed executed by the Kosiks. K & K Construction is a Michigan corporation, of which Joseph Kosik and one of his sons are the sole

shareholders. K & K Construction has no ownership interest in the property involved in this case. Resorts and Company is a Michigan co-partnership and is a part owner of the 82 acres of property.

The Court of Claims concluded that the property consisted of four distinct parcels. The parcel at issue was parcel 1 on which J.F.K. Company wished to build a C.J. Barrymore's Restaurant. Parcel 1 covered approximately 55 acres of the total property. On May 28, 1988, plaintiffs applied for a permit to develop this property. On November 7, 1988, defendant denied the permit based on a determination that approximately 28 acres of the property was protected

wetlands under the Wetland Protection Act (WPA), M.C.L. 281.701 et seq.: M.S.A. 18.595 (51) et seq.

Plaintiffs then filed the present action on December 29, 1988, in the Court of Claims. Plaintiffs initially sought a declaratory ruling that the area is not wetlands, and injunctive relief against defendant from enforcing the WPA and seeking damages under the WPA. Plaintiffs sought a determination that defendant's actions constituted a taking of their property for which they were entitled to just compensation. On May 1, 1990, plaintiffs submitted a second application for a permit to fill approximately 3.17 acres of wetlands and to convert 5.26 acres of upland to wetlands. This plan

was known as the "Goga Plan" and involved a total of over 72 acres of property on parcels 1, 2, and 4. This second application was also denied on July 26, 1990.

Trial was held before the Court of Claims, sitting as the factfinder, on December 17, 1991. The only issue before the court was whether there was a taking because of the permit denial such that plaintiffs were entitled to just compensation. On November 2, 1992, the Court of Claims issued its opinion and order determining that a taking occurred because the wetlands restrictions rendered the property essentially worthless as commercial real estate, and that plaintiffs were therefore entitled

to just compensation. After various post-judgment motions, and consideration of the Goga Plan, the Court of Claims awarded a total of $3,279,178 in favor of plaintiffs.

II.

Plaintiff contend that defendant's action of denying the permit to fill the wetlands constitute an unconstitutional taking of property without just compensation. The Fifth Amendment to the federal Constitution provides: "nor shall private property be taken for public use, without just compensation." Similarly, the Michigan Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a

manner prescribed by law." Const. 1963, art. 10, § 2. The Takings Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment . Dolan v. City of Tigard, 512 U.S.___; 114 S. Ct. 2309; 129 L. Ed. 304, 315 (1994; Peterman v. Dep't of Natural Resources, 446 Mich. 177, 184 n.10; 521 N.E.2d 499 (1994).

A.

Property may only be taken when there exists an essential nexus between a legitimate state interest and the taking. If the nexus exists, then there must be a "rough proportionality" between the manner of the taking and the actual state interest involved. Dolan, supra. p. 317; Peterman, supra, p. 201. The parties do

not question that the state has a legitimate interest in preserving and protecting wetlands. See Attorney General ex rel Dep't of Natural Resources v. Huron Co. Road Comm'n, 212 Mich. Ap. 510, 516; 538 N.W.2d 68 (1995))"[t]he primary purpose of the WPA is to ensure that wetland habitats are preserved and protected"). See Harkins v. Dep't of Natural Resources, 206 Mich. App. 317, 324; 520 N.W.2d 653 (1994) ("the WPA unquestionably advances a legitimate state interest"). Thus, the crucial issue with which we are faced is whether there is a taking within the meaning of the Fifth Amendment to require just compensation.

The United States Supreme Court has

explained that the Fifth Amendment is violated when land use regulation does not substantially advance legitimate states interests or denies an owner economically viable use of the owner's land. Lucas v. South Carolina Coastal Council, 505 U.S. 1003; 112 S. Ct. 2886; 120 L. Ed. 2D 798, 813 (1992. In land use regulation cases, such as this, it has been recognized that when property may be regulated to a certain extent, if the regulation goes to far it will be recognized as a taking. Id., p. 812; Volkema v. Dep't of Natural Resources, 214 Mich. App. 66, 69; 542 N.W.2d 282 (1995). The Supreme Court has not set forth any set formula regarding what constitutes going "too far," but has

rather engaged in ad hoc, factual inquires. Lucas, supra, p. 812.

However, there are two distinct categories of regulatory action that require compensation without case-specific inquiry. The first category encompasses regulation that compel the property owner to suffer a physical invasion of the property. The second category is where regulation denies all economically beneficial or productive use of the land. Id., pp. 812-13. The Court of Claims concluded that application of the WPA denied plaintiffs all economically beneficial or productive use of the land.

The United States Supreme Court has noted that "affirmatively supporting a

compensation requirement . . . [are] regulations that leave the owner of land without economically beneficial or productive options for its use-typically . . . by requiring land to be left substantially in its natural state." Id. p. 814. In Lucas, the court held that where the state seeks to sustain regulation that deprives property of all economically beneficial use, the state may resist compensation only if an inquiry into the nature of the owner's property shows that the proscribed use interest were not part of the title to begin with. Id. p. 820. Thus, a regulation that prohibits all economically beneficial use of land cannot be newly legislated or decreed

without compensation, but must inhere in the title itself, with the restriction that background principles of state property law may already place on land ownership. Id. p. 821.

In the case before us, we reject defendant's claim that the permit denial was based on a fundamental principle of Michigan property law. Defendant claims that such a principle is found in our state Constitution:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const. 1963, art. 4, § 52.].

In Lucas, the Supreme court made clear that the state must do more than proffer the legislatures declaration that the uses the landowner desires are inconsistent with the public interest. Rather, the state must identify background principles of nuisance and property that prohibit the uses of the landowner intends in the circumstances in which the property is found. Lucas, supra, pp. 822-23.

The constitutional provision cited above is not a principle of nuisance and property law. The decision to build a restaurant on land, or a request to fill in wetland, do not constitute nuisances that the government may abate. See Id. , p. 821; Miller Pros v. Dep't of Natural

Resources, 203 Mich. App. Ct. 674, 682; 513 N.W.2d 217 91994). We are not aware of any common law preventing the building of a restaurant on plaintiff's land. Thus, the generalized invocation of public interests in the state Constitution, and the legislatures's declaration in the WPA and the Michigan Environmental Protection Act. M.C.L. 691.1201 et. Seq.; MSA 14.528(201) et seq., do not constitute background principles if nuisance and property law sufficient to prohibit the use of plaintiffs' land without just compensation.

B.

Defendant also contends that because the regulation, the WPA, was enacted

before the quit claim deed passed title to J.F.K. Company, plaintiffs are precluded from compensation. We do not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2; 107 S. Ct. 3141; 97 L. Ed. 2D 677 (1987) (The landowner's rights were not altered because they acquired the land well after the commission had begun to implement its policy. So long as the commission could not have deprived the prior owners of the easement without compensation, the prior owners must be understood to have transferred their full property rights in conveying the lot.).

In this case, the property was acquired by Joseph and Elaine Kosik in 1976. They transferred the property through a quit claim deed to J.F.K. Company in 1986. The WPA went into effect in 190. The passage of the WPA cannot be understood as depriving J.F.K Company of just compensation merely because the WPA as in effect when the quit claim deed was executed. Because we have concluded that the proscribed use interest in this case do not inhere in the title itself, the timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation. Lucas, supra, pp. 820-23.

C.

Next, in order to determine if

plaintiffs were deprived of all economically beneficial or productive use of their land, we must decide what specific property was affected by the permit denial. It is defendant's contention that the Court of Claims should have considered all 82 acres of the property in determining whether a taking occurred in this case. At trial, plaintiffs argued that the Court of Claims should only consider the 28 acres that were declared to be wetlands. The Court of Claims rejected both contentions and found that it would consider the 55 acres designated as parcel 1. On appeal, plaintiffs urge use to affirm the Court of Claims' ruling. We find that the Court of Claims' factual finding is this regard

is not clearly erroneous. MCR 2.613(c).

A proper resolution of this issue is not subject to any clear rule. In Bevin v. Brandon Twp. 438 Mich. 385, 393; 475 N.W.2d 37 (1991), modified 439 Mich. 1202 (1991, our Supreme Court held that generally , a person's property should be considered as a whole when deciding whether a regularity taking has occurred. In Bevin, however, the property in question consisted of two contiguous parcels under the same ownership and subject to a single zoning scheme. In the case before us, parcel 1 is zoned for commercial use, while parcel 2, 3, and 4 are zoned for residential use. Further, there is no single owner of all four parcels. Parcel I is owned in part by

J.F.K. Company, and parcels 2 and 4 are owned solely by J.F.K. Company. Parcel 3 is owned by both J. F.K. Company and Resorts and Company. Finally, the regulation is this case does not affect all four parcels. Only parcel 1 is affected by the WPA.

More recently, this Court relied on Loveladies Harbor, Inc. V. United States, 28 F.2d 1171 (CA Fed. 1994) in analyzing a similar issue. See Volkema, supra, pp. 71-72. In Loveladies Harbor, the plaintiffs originally owned 250 acres of land which and been acquired in 1958. By 1972, 199 acres of the land had been developed, before the enactment of § 404 of the Clean Water Act. The plaintiffs sought a fill permit to develop the

remaining 51 acres for residential use. The permit was initially denied, but the state eventually entered into an agreement whereby the plaintiffs could develop 12.5 acres of the land. However, the plaintiffs also had to seek permit approval from the Army Corps of Engineers. The Corps ultimately denied the permit.

The court in Loveladies Harbor had to determine the "denominator parcel" in order to determine whether a talking had occurred. The court rejected any brightline rule and instead adopted a flexible approach to account for factual nuances of each individual case. Loveladies Harbor, supra. p.1181. This approach was also recently adopted by

this Court in Volkema, supra, p. 73. The court in loveladies Harbor, found that the 199 acres that had been developed before enactment of § 404 of the Clean Water Act should not be considered as part of the denominator because no effort had been made by the state to regulate that land. With regard to the remaining 51 acres, the court found that the 38.5 acres had been essentially given to the state in exchange for the permit to develop the remaining 12.5 acres. The court refused to include the 38.5 acres as part of the denominator because that land had no value to the plaintiffs. Thus, the court concluded that only 12.5 acres would be considered as the denominator, and that because the value

was de minimus, the owner was deprived of all economically feasible use of the property and was entitled to just compensation. Loveladies Harbor, supra, pp. 1181-1182.

In Volkema, the Court employed the same "factual nuances" analysis, but reached a different conclusion. The plaintiffs in Volkema, bought 45 acres of commercial property in 1963 and a contiguous five-acre parcel in 1979. The plaintiffs developed the property and were left with 24.6 acres at the time of the litigation. The plaintiffs sought a permit to fill 4.3 acres of wetlands, but that permit was denied. The plaintiffs sought compensation for the six acres they claimed were rendered useless

because of the denial of this fill permit.

This Court held that it would not include the entire 45 acres as the denominator because approximately half of that land was developed before enactment of the WPA. However, this Court held that it would consider the remaining 24.6 acres as the denominator, rather than the six acres as urged by the plaintiffs. In Volkema, the entire 24.6 acres was of high value to the plaintiffs, and the land, when viewed as a whole, continued to have substantial value because it could still be developed for commercial purposes. Thus, this Court concluded that the plaintiffs had suffered no taking where a majority of the land could be

developed for commercial purposes. Volkema, supra. p.74.

In the present case, the Court of Claims properly considered only the 55 acres of parcel 1. Parcels 2, 3, and 4 are zoned for residential purposes, while parcel 1 is zoned for commercial uses. Parcel 3 was developed before plaintiffs first applied for the permit. Parcels 2 and 4 are not developed. Because of the differences in zoning of the four parcels and the differences in ownership, we conclude that the Court of Claims' factual finding that the 55 acres should be considered as the denominator is not clearly erroneous.

D.

Defendant next contends, however,

that even in light of the regulation, there was no taking because the property retained significant value. The Court of Claims found that parcel 1, as regulated by the permit denial, was essentially worthless as commercial real estate. This factual finding is not clearly erroneous based on the evidence presented at trial.

The Court of Claims credited the testimony of plaintiffs' experts who concluded that the property was essentially worthless. The Court of Claims discounted the conclusion of the defendant's expert that the edges of the parcel could still be developed, because that conclusion was refuted by plaintiffs' experts. We note that the 28 acres of wetlands is irregularly shaped

within the 55-acre parcel. Thus, it is not possible to simply leave the wetlands area undeveloped and build on the remaining 27 acres. If the 28 acres of wetlands was not developed, the only area that could be feasibly developed would be the edges of the area of parcel 1. This was apparently not economically feasible because of the land needs for a restaurant, including parking lots. Thus, this case is unlike Volkema because there the plaintiffs could still use the remaining 18 acres of the 24 acres of property. Here, the plaintiffs could not develop the remaining 27 acres because of the configuration of the wetlands within the parcel.

Accordingly, the Court of Claims did

not err in concluding that the regulation in this case denied the owners of all economically beneficial or productive use of the land. Thus, a taking occurred within the meaning of the Fifth Amendment and plaintiffs were entitled to just compensation for the 55 acres of land affected by the regulation.

III.

Defendant next argues that the Court of Claims erred in rejecting its option to cure the taking by permitting implementation of the "Goga Plan."

Plaintiffs first submitted an application on May 28, 1988 regarding development of parcel 1. On November 7, 1988, defendant denied a permit to develop the property because 28 acres of

the parcel was determined to be protected wetlands. Plaintiffs then filed their complaint on December 29, 1988. Thereafter, William Goga, a civil engineer retained by plaintiffs, developed a mitigation plan. He proposed that some wetlands be filled in parcel 1, but that wetlands could be created in the parcel out of non-wetland area. This plan was submitted to defendant in April 1990. Defendant rejected this plan after its submission and denied a permit application based on Goga's plan in July 1990.

Trial in this matter was held on December 17, 1991. On November 5, 1992, the Court of Claims issued its opinion and order finding that a taking had

occurred because plaintiffs were denied all economically beneficial or productive use of the land because of the permit denial. It was not until after this determination that defendant agreed to accept the Goga Plan. The Court of Claims issued a second opinion and order, dated May 4, 1993, which mainly dealt with various compensation issues. The Court of Claims specifically found that defendant was entitled to accept the Goga Plan pursuant to MCL 281.721(3)(c); MSA 18.595(71)(3)(c). This provision specifically allows defendant to modify its action so as to minimize the detrimental effect to the property's value after the court determined that defendant's action constituted a taking.

The Court of Claims found to objection to this approach. The Court of Claims then stated that those portions of the property defined as being part of the Goga Plan may be exempted from the taking, while those portions that were to be transformed into wetlands would be considered to be condemned.

In considering what constituted just compensation, the Court of Claims ruled that plaintiffs would be awarded interest and fair market value of the portion of land actually condemned. The court specifically did not include that portion of the land that could still be commercially developed under the Goga Plan. Thus, defendant's characterization of the Court of Claims action as being a

rejection of defendant's decision to accept the Goga Plan is not supported in the record.

Further, we cannot agree with defendant's contention that its decision to offer a permit for the Goga Plan eliminates the taking. The Court of Claims found, and we agree, that there was an unconstitutional taking in this case due to the regulation of the wetlands area. It was not until after a finding by the Court of Claims that defendant decided to accept implementation of the Goga Plan. However, this action does not eliminate a taking. As the Court of Claims correctly determined, 27 acres of the parcel were temporarily taken and 28 acres were

permanently taken.

In First English Evangelical Lutheran Church of Glendale v. Los Angeles Co., 482 U.S. 304, 321, 107 S.Ct. 2378; 96 L. Ed. 2D 250 (1987), the Supreme Court held that where the government's activities have created a taking of all use of property, so subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Such "temporary takings" are also entitled to just compensation.

Therefore, we find that the Court of Claims did not err in awarding compensation. The court properly found that there was a temporary taking

concerning part of the land and a permanent taking concerning the remaining portion of the land. Thus, the court's order awarding compensation complied with MCL 281.721(4); MSA 18.595(71)(4) in that it found a temporary taking concerning part of the land that could be developed under the Goga Plan.

IV.

Next, defendant contends that the trial court erred in finding MCL 281.721(4); MSA 18.595(71)(4) unconstitutional in that it violated the just compensation clause of the Fifth Amendment and Const. 1963, art. 16, § 2.

The Court of Claims did not err in finding § 21(4) is unconstitutional because it limits plaintiffs recovery to

twice the state equalized value of the property taken. Both the federal and state constitutions provide that private property cannot be taken for public use without just compensation. Just compensation means the full monetary equivalent of the property taken. Abttota Farmers Elevator & Warehouse Co. v. Unites States, 409 U.S. 470, 473; 93 S. Ct. 791; 35 L. Ed. 2D 1(1973). Just compensation is that amount that places a property owner in a condition as good as the owner would have been had the taking not occurred. Id.; Oakland Hills Development Corp. v. Lueders Drainage District, 212 Mich. App. 284, 292-293; 537 N.W.2d 258 (1995).

The determination of the measure of

just compensation for a taking is a judicial, not a legislative, question. United States v. Sioux Nation of Indians, 488 U.S. 371, 417 n.30; 100 S.Ct. 2716; 65 L.Ed. 463 (1980), citing Monongahela Navigation Co. v. Unites States, 148 U.S. 312, 327; 13 S.Ct. 622; 37 L.Ed. 1209 (1936). Because the determination of the proper measure of compensation for a taking is solely a judicial question, the legislature may not restrict the measure of just compensation in a takings case. Baltimore & Ohio Railroad Co. v. Unites States, 298 U.S. 349; 368; 56 S. Ct. 797; 80 L. Ed. 1209 (1936). Thus, statutes that set forth the compensation rate for a taking, such as MCL 281.721(4); MSA 18.595(71)(4), are unconstitutional. See

Baltimore and Ohio, supra; Monongahela, supra.

Because MCL 281.721(4); MSA 18.595(71)(4) mandates the method of computing just compensation for a taking, the Court of Claims correctly held that it is unconstitutional.

V.

Last, defendant argues that the Court of Claims awarded excessive damages for the taking. We disagree.

The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. Miller Bros, supra, p. 685. The public must not be enriched at the property owners' expense, but neither should

property owners be enriched at the public's expense. Id. There is no formula or artificial measure of damages applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented. Poirier v. Grand Blanc Twp, after remand, 192 Mich. App. 539, 543; 481 N.W.2d 762 (1992).

In avoiding windfalls to property owners, the nature of the taking must be considered. Where there is a temporary taking, the just compensation awarded must reflect its temporary nature. Miller Bros, supra. p. 687. This Court has recognized that money damages are

recoverable for a temporary, unconstitutional taking. Courts should engage in a flexible approach in determining compensation for a temporary taking. Some factors to consider include: rental return, option price, interest on lost profit, before and after valuation, and benefit to the government. Poirer, supra, p. 544-545.

The Court of Claims awarded $3,245,256, plus interest of $1,574,522.60 for the property taken. The Court of Claims also awarded $459,400 for the temporary use of the property. The court's award of damages is based on the evidence presented and does not appear to be an abuse of discretion. In this case, because of the difficulty in determining

the fair market value of the land with the use restrictions placed on it, the court appeared to engage in a flexible approach in computing damages. Defendant has not shown that the Court of Claim's computation of damages was erroneous or excessive.

Affirmed.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN SUPERIOR COURT

C.A. CO. 87-1077

MARY E. LEONARD

V.

TOWN OF BRIMFIELD, ZONING BOARD OF APPEALS

FINDINGS, RULINGS AND ORDER OF JUDGMENT

The plaintiff owns sixteen acres of land lying between the Quaboag River and Dunhamton Road in Brimfield, Massachusetts. The area is zoned a Flood Plain Zone. It is shown on Exhibit 5, Plan of the land by Smith Associates, march 1987, which divides the land into

four lots. The house which the plaintiff proposed to build is shown on lot 12B on that plan. The plan has not been recorded in the registry. The Brimfield building inspector granted a building permit dated March 30, 1987 for a single family house. Then in an April letter he revoked the permit for the reason that a permit in a Flood Plain Zone required a finding by the Board of Appeals that the use would not endanger the health or safety of the occupants thereof.

Mary Leonard then filed a request for a special permit on or about April 13, 1987. By a decision dated June 2, 1987, the Board granted the request but limited construction to land at and above the 370' elevation mark. The plan of the

land by Smith Associates dated March 1987 (Exh.5), prior to her request for a permit, placed the house at a point which was at an elevation of 370 feet or higher. The top of the well installed by Mary Leonard, seen by the court on a view, was within 50 feet of Dunhamton Road at an elevation of 368 feet.

The 100 year flood zone would indicate flooding from the Quaboag river would bring water onto the property up to the elevation of 360 feet. A neighbor, Demers, who testified indicated that the 1955 flood covered Dunhamton Road at the southern end of the property , and he drew a pencil on Exhibit 5 where he recalled the flood waters from the 1955 flood to have reached. Exhibit 10 showed

the position on the property of the 360' line, 100 year flood, and the 365' line, the 500 year flood. The line drawn by witness Demers would come close to the top of the well as shown on that plan.

In an appeal from the decision of the zoning board of appeals, the court's function is to determine de novo whether there was adequate basis for the board's decision and to see that it was not made on legally untenable basis, was not arbitrary or capricious, and made for some legally impermissible reason. If the reasonable minds differ as to the issuance of a permit, it is the boards' decision that will govern, not the court's. Kinchla v. Planning Board of Assessors of Falmouth, 11 Mass. App. Ct.

927 (1981). See Garvey v. Board of Appeals of Amherst, 9 Mass. App. Ct. 856 (1980); Malcomb v. Board of Appeals of Southborough, 361 Mass. 887 (1972).

The Superior Court in reviewing the board's decision may consider only the evidence which formed the basis of the board's action. See McDonald's Corporation v. Town of East Longmeadow, 25 Mass. App. Ct. 904, 905 (1985) (rescript). The court cannot substitute its judgment of that of the Board. McDonald's Corporation v. Board of Selectmen of Randoph, 9 Mass. App. Ct. 830, 832 (1980) (rescript).

I find that the plaintiff has not demonstrated by a fair preponderance of the evidence that the Board's decision

was out-side the scope of its authority and should be annulled, or that there was not adequate basis for the Board's decision. I therefore affirm the decision of the Brimfield Zoning Board of Appeals and dismiss the appeal.

_____

William H. Welch
Justice of the Superior Court

Entered: October 19, 1987.